(17)

IN THE

Supreme Court of the United States

OCTOBER TERM

No. 599

MABLE SWALES FAIRCLAW, *Petitioner*

v.

JOHN FORREST, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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To the Honorable
The Chief Justice and the
Associate Justices of the Supreme Court
Of the United States:

Your petitioner, Mable Swales Fairclaw, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, rendered in the above captioned cause on August 4, 1942, affirming the judgment of the District Court of the United States for the District of Columbia dismissing, on the merits, the complaint filed by the petitioner seeking construction of a last will and testament in favor of petitioner and a resultant partition of certain real estate situated in the District of Columbia.

OPINIONS OF COURTS BELOW

The District Court did not render a written opinion; its judgment dismissing the petitioner's complaint on the merits appears in the Record (R. 4).

The opinion of the United States Court of Appeals for the District of Columbia, No. 7909, rendered August 4, 1942, is reported in 130 F(2) 829, and appears in the Record (R. 15).

JURISDICTION

The decision of the Court of Appeals was rendered August 4, 1942 and judgment entered on same date (R. 23). A petition for rehearing was filed August 19, 1942 and denied September 30, 1942 (R. 24).

The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT

In January, 1926, certain real estate situated in the District of Columbia and known as premises 120 You Street, N. W., was conveyed to Harry C. Pryor and his wife, Mable Pryor, as joint-tenants, in fee simple. On November 20, 1928, while said husband and wife were so seised of said real estate, Mable Pryor executed her last will and testament, the residuary clause of which devised said real estate to her brother, John Forrest, the respondent herein (R. 3-4). Harry Pryor and his wife, Mable Pryor, continued to be so seised of said real estate until January, 1933, when the husband died, leaving his wife, the testatrix, surviving him as the surviving tenant of said estate. Mable Pryor continued seised of said real estate until January, 1939, when she died without having changed or republished her said will (R. 3). The will was duly admitted to probate and record.

In January, 1941, the petitioner, Mable Swales Fairclaw,

one of the two then surviving heirs at law and next of kin of said Mable Pryor, deceased, filed a complaint in the District Court of the United States for the District of Columbia, against John Forrest, the respondent and other surviving heir at law and next of kin of said decedent, seeking a judicial construction of said last will and testament and seeking a partition of said real estate, on the ground that said testatrix had died intestate as to said real estate (R. 1).

On motion of the respondent the District Court dismissed the complaint on the merits on the ground that said decedent did not die intestate as to said real estate, but that the same had passed under the residuary clause of said will to the respondent. Judgment was entered accordingly. The petitioner appealed (R. 5). The Court of Appeals affirmed the judgment of the District Court (R. 23).

QUESTIONS PRESENTED

The questions presented for the determination of this Honorable Court are:

1. Whether or not, in the absence of a regulatory statute, a will executed by one of the entirety spouses during the existence of the entirety estate and which purports to devise the entirety real estate situated in the District of Columbia, operates as an effective devise of said real estate if the testator becomes the surviving entirety tenant and dies seised of said real estate without having changed or republished said will?

2. Whether or not any interest of a surviving tenant by the entirety in real estate situated in the District of Columbia is after-acquired real estate and subject to the provisions of Title 29, Chapter 3, Section 45, of the District of Columbia Code (1929)?

3. Whether or not the testatrix died intestate as to the real estate involved in this case?

STATUTE INVOLVED

(a) Statute involved:

Title 29, Chapter 3, Section 45 of the District of Columbia Code (1929) (Section 19:205, District of Columbia Code (1940), the pertinent part of which reads as follows:

> ". . . any will executed after January 1, 1902, which shall by words of general import devise all the estate or all of the real estate of the testator shall be deemed, taken, and held to operate as a valid devise of any real estate acquired by said testator after the execution of such will, unless it shall appear therefrom that it was not the intention of the testator to devise such after-acquired property."

SPECIFICATION OF ERRORS

The Court of Appeals erred:

(1) In not holding that this will, executed by one of the entirety spouses during the existence of the entirety estate and which purports to devise the entirety real estate situated in the District of Columbia, does not operate as an effective devise of said real estate where the testatrix became the surviving entirety spouse and died seised of said real estate and without having changed or republished her will.

(2) In not holding that this will, with respect to this real estate, took effect on the date of its execution, and not on the date of death of the testatrix.

(3) In not holding that Title 29, Chapter 3, Section 45 of the District of Columbia Code (1929) was inapplicable to the solution of this case.

(4) In not holding that with respect to this real estate, said testatrix died intestate as to it.

DISCUSSION

The undisputed facts in this case are: That on January 18, 1926, the real estate in question was conveyed by a deed in fee simple to Harry C. Pryor and his wife, Mable Pryor, as joint-tenants; that on November 20, 1928, while said husband and wife were so seised of said real estate, Mable Pryor executed her last will and testament and by the residuary clause therein devised said real estate to her brother, the respondent; that said husband and wife continued so seised of said real estate until January 26, 1933, when the husband, Harry C. Pryor, died leaving his wife, the testatrix, surviving him as the surviving tenant of the estate; that on January 28, 1939, Mable Pryor died seised of said real estate and without having changed or republished her will, and at the date of the filing of the complaint seeking a construction of said will the respondent and petitioner were the only two surviving heirs at law and next of kin of said testatrix.

Under the foregoing facts the petitioner contends that the testatrix died intestate as to said real estate and as an heir at law the petitioner is entitled to a partition of said real estate, under the following theory:

PETITIONER'S THEORY

The deed of January 18, 1926, conveying said real estate to husband and wife as joint-tenants in fee simple, created an estate by the entirety in fee simple, and not a joint-tenancy.

Settle v. Settle, 56 App. (DC) 50

The essential characteristics of an estate by the entirety are that each spouse is seised of the whole of the entirety, and not a share, moiety or divisible part. Each spouse is

seised per tout et non per my, and not per my et per tout as joint tenants.

Settle v. Settle, 56 App. (DC) 50
Flaherty v. Columbus, 41 App. (DC) 525

Tenancies by the entireties, in the District of Columbia, are not modified by the Married Woman's Act. The estate exists as at common law, unaffected by statute.

Loughran v. Lemmon, 19 App. (DC) 141

In the Loughran Case, it was said:

> "There is nothing in the Married Woman's Act, in force in this District, that in any way defeats or destroys the common-law estate by the entireties, as that estate subsists between husband and wife by purchase. The estate exists as at common law unaffected by statute."

An estate by the entirety cannot be devised by either spouse during the existence of the tenancy.

Alsop v. Fedarwisch, 9 App. (DC) 409
Chaplin v. Leapley, 35 Ind. App. 511; 74 NE 546
Webber v. Webber, 217 Mich. 178; 185 NW 761

In the Webber Case where entirety real estate was involved, the testator devised the property to his wife for life, remainder to his son in fee. The son died, intestate, during the widow's lifetime, and in a suit by the heirs at law of the testator claiming to be the fee simple owners against the widow, the Court in sustaining a dismissal of the suit said, in part, as follows:

> ". . . The death of Mr. Weber ended his estate by entirety in this property, and during his lifetime he could no more devise it by will than he could by deed."

A will, with respect to the real estate it purports to devise, takes effect as of the date of its execution, and not the date of death of the testator.

McAleer v. Schneider, 2 App. (DC) 461
Bradford v. Matthews, 9 App. (DC) 438
Crenshaw v. McCormick, 19 App. (DC) 494

Title 29, Chapter 3, Section 45 of the District of Columbia Code (1929) which has been discussed in connection with the solution of this case deals with the testamentary disposition of real estate *acquired by a testator after he executes his will,* and to that extent modifies the foregoing common law rule. But with respect to real estate *acquired by the testator before he executes his will* there is no statute in the District of Columbia that changes this common law rule. Therefore, it is vitally material in this case whether the real estate here involved is "pre- or after-acquired" property.

This testatrix, as surviving tenant by the entirety, did not take or acquire any new or additional interest in said real estate after the execution of her will. The only event which gave rise to any such possibility was the death of the other entirety tenant, the testatrix' husband, in 1933. In Lang v. Commissioner of Internal Revenue, 289 US 109, in holding that the surviving tenant by the entirety did not take or acquire any new or additional interest in the entirety real estate upon the death of the deceased spouse, the Court said:

> "An estate by the entirety is held by the husband and wife in single ownership, by single title. They do not take moieties, but both and each take the whole estate, that is to say, the entirety. The tenancy results from the common law principle of marital unity; and is said to be sui generis. Upon the death of one of the tenants the survivor does not take as a new acquisition, but under the original limitation, his estate being simple freed from participation by the other. In the present case when the husband died the wife, in respect to this estate, did not succeed to anything. She simply continued, in virtue of the nature of the tenancy, to possess and own what she already had. . . ."

If there is any interest of any nature whatsoever that is acquired by the surviving entirety spouse in joint entirety property upon the death of his entirety mate, it seems it certainly would have been recognized in Beddingfield v. Estill, 100 SW 108. In that case husband and wife owned certain real estate as tenants by the entirety. The husband feloniously killed his wife. There was a statute which prohibited a murderer from taking any property from his deceased victim in any manner or form. In holding that the statute in question did not affect the husband's interest in the entirety estate, because he acquired no interest of any kind from the murdered wife, the Court said:

> "The estate of husband and wife in an estate by the entirety is a unit, not made up of any devisible parts subsisting in different natural persons, but an indivisible whole, nested in two persons who are actually distinct, yet who, according to legal intendment, are one and the same. On the death of husband or wife, the survivor takes no new estate or interest—nothing that was not in him or her before. It is a mere change in the properties of the legal person holding—not of the legal estate holden."

See also:

Baker v. Sharpe, 51 Ind. App. 547; 96 NE 627
Stuckey v. Keefe's Executors, 26 Penna. 399

If the testatrix did not acquire this real estate, nor any interest therein, after she executed her will, then her intention to devise it is immaterial because conceding that she intended to devise said real estate her intention cannot be given effect because to do so would contravene some well settled rules of law.

Alsop v. Fedarwisch, 9 App. (DC) 408
White v. Summers, L. R. 2 Ch. 256
Hays v. Jackson, 6 Mass. 149

In Alsop v. Fedarwisch, 9 App. (DC) 408, the Court said:

> "We fail to see how this conclusion can well be affected by the will of Joseph Frank, even if he owned no other property than his interest in the land in controversy. It may be that Joseph Frank made the mistake of supposing that he owned an interest in this land which he could devise, or even that he owned the whole of it. That mistake did not make him such an owner; . . ."

The substance of petitioner's contentions in the language of the layman amounts to this:

> When the testatrix tried, she couldn't;
> when the testatrix could, she didn't!

ANALYSIS OF OPINION BELOW

While the opinion of the Court of Appeals unanimously affirmed the judgment of the lower court, the reasons assigned in support thereof were divided: two of the Justices concurring in reasons supporting their view, and the other Justice, in a separate opinion, assigned other and different reasons leading to his concurrence in the final result. Therefore, for purposes of this petition the opinion will be referred to herein as the majority opinion and the minority opinion.

Majority Opinion

The majority opininon holds that a will executed by the surviving entirety tenant during the existence of said tenancy and which purports to devise said real estate and which remains unchanged and unrepublished until the death of said survivor seised of the realty, is effective to devise said real estate.

Two reasons are assigned in support of this conclusion, the first of which is on page six (6) of the opinion. After stating that each entirety spouse has only a contingent pos-

sibility of ever enjoying the estate exclusively, the opinion proceeds to give the basis of its conclusion, the substance of which seems to be: That in an estate by the entirety the contingent possibility as to which spouse will be the survivor being coupled, in legal theory, with a presently vested estate, is such an interest that may be devised under a will executed by the surviving tenant during the existence of the tenancy.

The second reason given by the majority deals with the pertinent applicability of the common law rule: that a will, with respect to the real estate it purports to devise, takes effect on the date of its execution, and not the date of death of the testator. After acknowledging that the rule formerly controlled the devise of real estate, the majority opinion states:

> "the rule is now merely a principle of construction. . . . So far as this is merely a rule of construction, it cannot overcome the testator's clearly expressed intention. So far as it formerly applied to exclude after-acquired property from the effect of the will, Section 45 has overruled it. . . . On the contrary, the will is effective as of the date of death."

We respectfully submit that each of the foregoing reasons assigned in support of the majority conclusion is error.

First Reason. There are two types of contingent interests:

(a) If the contingency relates to something other than the identity of the person who is to take the estate, then the interest is said to be a vested contingent one (sometimes referred to as a contingent interest with a vested aspect), and as such is subject to alienation and levy and sale on execution and will support title by estoppel.

Golladay v. Knock, et al., 85 NE 649

(b) If the contingency relates to the identity of the per-

son who is to take the estate the contingent interest is said to be a mere expectancy or possibility, and as such is not subject to alienation, nor to levy and sale on execution.

Suskin & Berry v. Rumley, 37 F(2) 304.

In applying these rules to the present case we find that the uncertainty referred to in the majority opinion, to wit: as to which one of the entirety spouses would become the survivor,—was a contingency relating to the identity of the spouse who would become entitled to the sole enjoyment of the entirety estate, and therefore was a mere expectancy or possibility. Irrespective of what the rule may be in other jurisdictions with reference to the interest of an entirety tenant being subject to encumbrance, levy and sale on execution during the existence of the tenancy, the rule in the District of Columbia is that such interest is not subject to alienation, encumbrance, levy and sale on execution nor to partition during the continuance of the entirety estate.

American Wholesale Corp. v. Aronstein, 56 App. (DC) 126; 10 F(2) 991

Settle v. Settle, 56 App. (DC) 50; 8 F(2) 911

It follows therefore, that said mere expectancy or possibility was not coupled with a presently vested estate such as was alienable by either spouse alone during the existence of the tenancy, nor one which was subject to levy and sale on execution on a judgment against either spouse during the other's lifetime.

Settle v. Settle, 56 App. (DC) 50

American Wholesale Corp. v. Aronstein, 56 App (DC) 126

The case at bar does not even come within that class of cases where a transfer of a mere expectancy, if coupled with an alienable vested estate, has been sustained if the transfer is made to a party in interest, but void if made to

a stranger. The reasons why this case does not come within the foregoing rule are: (1) the vested estate here involved was not alienable by the testatrix alone to a stranger at the time she made her will; and (2) the attempted testamentary transfer was to a stranger to the interest being dealt with.

Jeffers v. Lampson, 10 Ohio St. 101

The majority opinion cites Eckhardt v. Osborne, 338 Ill. 611; 170 NE 774, as an adjudicated authority in support of its conclusion. But the Eckhardt Case is readily distinguishable from the case at bar. In that case both spouses joined in making a joint will devising real estate held by them as joint-tenants. In American Wholesale Corp. v. Aronstein, 56 App. (DC) 126, the Court in stating the essentials of an estate by the entirety, said:

> "In an estate by the entirety there must be unity of estate; unity of control, and unity of conveying or incumbering it."

Since a will devising real estate is considered as an appointment of a person to take the specific real estate, in the nature of a conveyance, though fluctuating until death;

Hardenberg v. Ray, 151 US 112,

and since an estate by the entirety has always been subject to disposition by the *joint voluntary act* of both entirety spouses;

American Wholesale Corp. v. Aronstein, 56 App. (DC) 126

and since the better rule seems to be, that a will jointly executed by husband and wife devising property which is owned jointly by both testators is not subject to probate until the death of the survivor;

In re Davis, 120 N. C. 9, 26 SE 636,

it therefore follows that the decision in the Eckhardt Case

is in harmony with the logical application of the rules of law governing the disposition of an estate by the entirety. But in the present case the will was executed during the existence of the tenancy of *one spouse only,* who subsequently became the surviving tenant, therefore, this case lacks that indispensable essential of *joint concurrence* in the effective transfer of an estate by the entirety.

Second Reason. One of the pillars upon which petitioner's case rests is: that a will, with reference to the real estate it purports to devise, takes effect as of the date of its execution, and not the date of the testator. Before petitioner's case can fall this pillar of strength must be removed; not merely by saying in effect that it does not exist, but it must be removed by applying some applicable rule of law that has the legal effect of removal. The instrument used in the majority opinion to remove this barrier is the rule of construction theory. The application of its use is to be found in the last paragraph of the majority opinion on page seven (7) and therein is also found the heart of the error leading to the majority conclusion. After stating that the rule formerly applied to the testamentary disposition of real estate, the majority say, in part:

> "The statement, upon which appellant relies, 'that the will speaks as of the date of execution, not of the date of death,' is now merely a principle of construction. . . . So far as this is merely a rule of construction, it cannot overcome the testator's clearly expressed intention. So far as it formerly applied to exclude after-acquired property from the effect of the will, Section 45 has overruled it. We do not understand it to be a rule of law in the sense that it renders property incapable of being devised. On the contrary, the will is effective as of the date of death."

Petitioner admits that the combined general effect of the provisions of Title 29, Chapter 3, Sections 41; 43, and 45 of the District of Columbia Code (1929) (Sections 19:201;

19:203 and 19:205, D. C. Code (1940)), governing the testamentary disposition of real estate is to make a will, with reference thereto, take effect as of the date of the death of the testator. The reason supporting this general statement is based upon the fact, that with reference to the real estate owned by a testator at the time he executes his will he *usually* has a devisable interest in said property at that time, which is the effective date of said will as to it; and with reference to real estate acquired by a testator after the execution of his will, the effective date of the will, as to it, is the date of death of the testator. Therefore, the combined general effect of these two effective dates on the pre- and after-acquired real estate respectively in which the testator had a devisable interest on the respective dates is to make the will take effect as of the date of death.

But the facts in this case form a definite and well defined exception which does not come within the foregoing general rule because, notwithstanding the testatrix owned the real estate here involved at the time she executed her will, said real estate, unlike that presently owned and covered by the general rule, was not devisable at the time said testatrix executed her will, which was the effective date of her will as to said real estate.

The Court of Appeals for the District of Columbia has on three separate occasions specifically stated the common law rule—that a will, with respect to real estate, takes effect as of the date of its execution, and not the date of death of the testator—is in force and effect in the District of Columbia;

McAleer v. Schneider, 2 App. (DC) 461
Bradford v. Matthews, 9 App. (DC) 438
Crenshaw v. McCormick, 19 App. (DC) 494

and this common law rule has always been considered a rule of law and not a rule of construction.

Hays v. Jackson, 6 Mass. 149

In a further analysis the petitioner contends that in the

District of Columbia the common law rule under discussion still governs the testamentary disposition of real estate acquired by the testator before he executes his will; but that Title 29, Chapter 3, Section 45 of the District of Columbia Code (1929) has modified the rule with respect to the testamentary disposition of real estate acquired by the testator after he executes his will, the result being that as to after-acquired real estate the will takes effect as of the date of death of the testator. The effect of the application of this common law rule, as modified by said Section 45, to the case at bar was attempted by petitioner on the argument below. The illustration put by counsel, and commented upon in the majority opinion, was a forensic effort to demonstrate the three types of circumstances under which this will might have been executed; under two of which the will would have been effective to pass the property, and under the other, with respect to the real estate, it was a nullity. Thus:

(1) If the original grant had been made after the execution of the will the real estate would have passed under it as after-acquired real estate by virtue of Section 45 which makes a will, with respect to after-acquired real estate, take effect as of the date of death of the testator.

(2) If the will had been changed or republished after the death of the husband, the real estate would have passed under the will as an original devise thereof.

(3) But the will having been executed during the existence of the entirety estate and at a time when the testatrix did not have a devisable interest in said real estate, the will was ineffective to devise the real estate in question.

The majority opinion in commenting on this illustration says in part:

> "If the interest of a tenant by the entirety is not devisable or alienable, it is so because that is an incident of the estate, not because the will is made before or after the grant which creates the tenancy. Yet appellant concedes the interest is devisable if the will is executed before the grant is made. . . ."

It is respectfully submitted that under circumstances as here exist and in view of the provisions of said Section 45, it is the very essence of materiality as to whether or not the will was executed before or after the grant was made. The reason is this: The statute does not touch or affect an estate by the entirety as such; the estate still retains all of its qualities and characteristics, including the one of being non-devisable by one of the spouses during its continuance. Notwithstanding the property is acquired after the execution of the will, if the testator spouse dies during the existence of the estate, Section 45 will not make the will effective to pass the decedent's interest in the entirety real estate because his interest would not be devisable at the date of his death, which is the date the will takes effect as to this after-acquired real estate under the provisions of Section 45. But, if the testator spouse becomes the surviving entirety tenant and dies seised of the real estate which he acquired after he executed his will, said property would pass under the will because (1) the real estate was acquired after the execution of the will; (2) at the time the testator died his estate had changed from an estate by the entirety in which he did not have a divisable interest, to an estate in severalty in which he did have a devisable interest at the date of his death; and (3) with respect to this real estate acquired after the execution of the will, Section 45 makes the effective date of said will as to said real estate as of the date of death of the testator, at which time the testator had a devisable interest in said property.

Minority Opinion

While the minority opinion supports a major portion of the contentions upon which petitioner bases her claim, yet an erroneous conclusion is reached because (1) of a misinterpretation of the qualities and incidents of an estate by the entirety; and (2) the misapplication of said Section 45 of the District of Columbia Code (1929) to this case.

The first error in the process of reasoning of the minority opinion comes in a discussion of joint tenancy estates and estates by the entirety. On page (8) of the opinion, the Court says:

> "The principle of survivorship which is applicable to joint tenancies in persons other than husband and wife is applicable to tenancies by the entirety also. . . ."

Because the minority opinion turns on the point that some after-acquired interest passed to the wife upon the death of the husband the correctness of the application of the principle of survivorship to tenancy by the entireties becomes very material. Petitioner admits the principle of survivorship attaches to estates in joint tenancy; but petitioner contends that it does not attach to estates by the entirety. There are many fundamental distinctions between an estate in joint tenancy and an estate by the entirety, and one of the most important of these is to be found in the number of unities which go to make up the essence of the estates. An estate in joint tenancy has four unities, viz.: the unities of time, title, interest and possession, with the right of survivorship or jus accrescendi attaching; while an estate by the entirety has five unities, viz.: the unities of time, title, interest, possession and person, and there is no right of survivorship attaching thereto. The reason why the right of survivorship does not attach to an estate by the entirety as stated in Baker v. Sharpe, 96 NE 527, as follows:

> "If a joint tenant dies during the existence of the joint tenancy, his moiety goes to the survivor by the jus accrescendi, or right of survivorship; but when a tenant by the entirety dies the survivor holds the entire estate, not by virtue of any right which he acquires as survivor, but by virtue of the original grant or devise. Upon a vesting of an estate by the entirety, both tenants, by reason of the unity of their person by marriage, become seized of the whole estate, and neither is seized of any divisible part thereof; and therefore, upon the death of one the survivor being already seized of the whole, can acquire no new or additional interest by virtue of his survivorship."

To the same effect are—

Ashbaugh v. Ashbaugh, 273 Mo. 353; 201 SW 72

Stuckey v. Keefe's Executors, 26 Penna. 399.

We submit, therefore, if the minority opinion were based in whole or in part upon the element of survivorship attaching to this estate, it is error to that extent.

The turning point in the minority opinion, however, is stated by the Court as follows:

> "Such complete control was acquired by Mrs. Pryor only at the moment of her husband's death, and that addition to her interest was I think in a proper sense of the term property acquired after the execution of her will. That being true . . . I think the property in question passed by virtue of her will . . ."

The basis of the foregoing conclusion seems to be: That the right of freedom of sole control of the property which the testatrix had after the death of her husband was acquired after she executed her will and therefore came within the purview of said Section 45, thereby causing the property to pass under the will as after-acquired real estate. This, we respectfully submit, was error.

Every and all of the rights and incidents of an estate by the entirety which the death of one spouse leaves the other spouse free to exercise as the sole owner thereof, were

acquired by the survivor at the date of the creation of the estate. Tenants by the entirety are seised per tout et non per my. The result of this is that each entirety spouse, jointly and severally, holds and owns the whole entire estate together with all of the incidents and rights that go with and are peculiar to this type of estate, and whatever are the interests the entirety tenants have, they, and each of them, take at the date of the creation of the estate.

Lang v. Comm. of Int. Rev., 289 US 109

One of the results of entire ownership of any property is that of the right of exclusive control. In an estate by the entirety each of the spouses has that right to be enjoyed in the future, subject to its defeat by a survival of the other spouse. Since the ownership is joint and several in the entirety spouses, their control is joint and several: the joint control being presently enjoyed; the several control to be enjoyed in the future, subject to the predemise of the other spouse. This, as well as all of the other incidents of ownership they, and each of them, take at the date of the grant. The result being that when one entirety spouse dies leaving the other as the sole surviving owner, each and every incident of ownership which the survivor may now exercise alone, said survivor already had prior to the death of the deceased spouse.

Lang v. Commissioner of Internal Revenue, 289 US 109
Ashbaugh v. Ashbaugh, et al., 273 Mo. 353; 201 SW 72
Beddingfield v. Estill, 100 SW 108

Finally, it is respectfully submitted that this case does not come within the "generating source" principle as announced in those cases arising under the Federal revenue tax statutes of 1916 and 1921 and which was recognized and applied by this Court in Taylor v. U. S., 281 US 497; 50 S. Ct. 356. The tax cases are distinguished as not being applicable, as follows:

a. The Federal revenue tax statutes of 1916 and 1921 under which the tax cases were decided, specifically bring "all property, real or personal, tangible or intangible", as well as "estates in (by) the entirety", upon the death of one of the spouses, within the purview of those Acts; whereas, in the District of Columbia there is no statute which specifically or otherwise makes an estate by the entirety, either (1) devisable; or (2) after-acquired real estate under circumstances as here exist.

b. The property rights referred to in the tax cases specifically include those of an intangible and personal nature; whereas, the property contemplated within the meaning of Title 29, Chapter 3, Section 45, of the District of Columbia Code (1929), is real estate.

c. In the taxes cases, the question as to whether or not there had been, in the strict sense of the word, a "transfer" of property by the death of the decedent, was not involved; whereas the answer to that question is decisive if said Section 45 is applicable to the case at bar.

The language Mr. Justice Sutherland in Taylor v. U. S., 281 US 497, on this latter point is as follows:

> "The question here, then, is not whether there has been in the strict sense of the word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon the result (which Congress may call a transfer tax, a death duty, or anything else it sees fit), to be measured in whole or in part by the value of such rights."

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari to bring before this Court for review the decision and judgment of the United States Court of Appeals for the District of Columbia entered in this cause, should be granted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 599.

MABLE SWALES FAIRCLAW,
Petitioner,

v.

JOHN FORREST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

The Respondent opposes the granting of the Petition for Writ of Certiorari herein and prays that the Writ be denied.

OPINION BELOW.

The District Court entered judgment dismissing petitioner's amended complaint on the merits without written opinion (R. 4). The United States Court of Appeals for the District of Columbia affirmed the judgment and its opinion is reported in 130 F. (2d) 829 (R. 15).

JURISDICTION.

The judgment of the Court of Appeals was entered August 4, 1942 (R. 23) and a petition for rehearing denied September 30, 1942 (R. 24). The petitioner has invoked the jurisdiction of this Court under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. The respondent urges this Court not to assume jurisdiction, in that the case is not a proper one for review on writ of certiorari under Rule 38 of this Court.

QUESTION PRESENTED.

The only question is whether certain real estate situated in the District of Columbia which was owned by the testatrix, Mable Pryor, as surviving tenant by the entirety at the time of her death, passed to the respondent, John Forrest, under the residuary clause of the will of Mable Pryor which was executed during the existence of the tenancy by entireties, there being no specific devise of the property and the residuary clause being sufficiently comprehensive to include it, or whether the property descended as intestate property to petitioner and respondent as heirs at law. As stated by Mr. Justice Rutledge in the opinion of the Court of Appeals, the crucial issue is whether the interest of a tenant by entirety is devisable when the will is executed before he takes by survivorship (R. 18). The Court held that such an interest was one that testatrix was capable of devising, subject only to the contingency that her death before her husband's would have caused the devise to fail because in that event she would not have been the owner vested with the right of transfer at the time of her death (R. 21). Mr. Justice Stephens in a separate opinion concurred in the result but applied the local after-acquired property statute treating the complete control acquired by testatrix upon the death of her husband as an addition to

her interest which was property acquired after the execution of the will in a proper sense of the term (R. 22). In both opinions the property involved was held to pass to respondent as residuary devisee by virtue of the will.

STATEMENT.

Petitioner's amended complaint alleged in substance that certain real estate situated in the District of Columbia, designated as 120 You Street, Northwest, Washington, D. C., was acquired by Mable Pryor and her husband, Harry C. Pryor, as tenants by the entireties on January 18, 1926, (R. 9); that the will in question was executed November 20, 1928 (R. 3-4, 9); that Harry C. Pryor died in January, 1933, leaving Mable Pryor him surviving (R. 10); that Mable Pryor continued to be seized of said real estate as sole surviving tenant by the entirety until her death which occurred January 26, 1939 (R. 10); that Mable Pryor left surviving her a brother, John Forrest, who is the respondent herein, another brother, Samuel Forrest, who has since died intestate and unmarried, and a niece, Mable Swales Fairclaw, who is the petitioner herein, as her only heirs at law and next of kin (R. 10); and that the will in question was admitted to probate and record in the District of Columbia on September 15, 1939 (R. 11).

From these alleged facts it was contended by petitioner in her amended complaint that since Mable Pryor died without republishing her will or making any change therein after the death of Harry C. Pryor, she died intestate as to the real estate in question (R. 11). To this amended complaint the respondent interposed a motion to dismiss on the ground that the amended complaint failed to state a claim upon which relief could be granted (R. 13). Such motion was sustained by the District Court and that action affirmed by the Court of Appeals (R. 4, 23).

ARGUMENT.

(a) *Construction against intestacy.*

The premises 120 You Street, Northwest, is not specifically devised by any provision of the will and therefore must pass to John Forrest under the residuary clause which provides that "all the rest and residue of my estate, both *real*, personal and mixed, I give, *devise*, and bequeath to my brother, John Forrest . . ." (Italics added) (R. 4). The record shows that Mable Pryor had at least two brothers at the time of making her will. These brothers were named John Forrest and Samuel Forrest. She chose John Forrest as her residuary legatee and devisee. The fact that she chose John in preference to Samuel is a strong indication that she did not intend to die intestate as to any property. When making her will it is very reasonable to assume that she must also have contemplated upon the possibility of surviving her husband and in that event the will shows clearly that after certain specific bequests and legacies she intended John Forrest to have the remainder of her estate, both real and personal.

It is elementary that the purpose and function of a residuary clause is to make a complete testamentary disposition of the testator's estate so that no part of it may pass as intestate property. 69 *Corpus Juris* 413. That such was the testator's intention is evident from the wording of the residuary clause which specifically refers to "real" property and "devises" the same.

The general rule is well stated in 69 *Corpus Juris* 421, as follows:

> General words in a residuary clause will carry every interest of the testator, not otherwise disposed of, that is capable of being passed by a will unless it is expressly or by necessary implication excluded from its operation, be it immediate or remote, contingent, or reversionary, * * *.

Furthermore, the presumption is always against intestacy and the residuary clause should be construed so as to prevent it as regards any part of the testator's estate. 69 *Corpus Juris* 416-417.

In *Given* v. *Hilton*, 95 U. S. 591, Mr. Justice Strong speaking for this Court, at p. 594, said:

> The law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given.

(b) *Opinion of the Court of Appeals.*

It is extremely difficult for counsel to add any argument of substance to the full and well considered opinions rendered by Justices Rutledge and Stephens of the Court of Appeals and it seems quite unnecessary to attempt to do so. Although differing in reasoning the opinions are agreed as to the result, namely, that the property involved passed to the respondent, John Forrest, as residuary devisee. The essence of the opinion of the Court as stated by Mr. Justice Rutledge seems to be contained in the last two paragraphs of the opinion, which are as follows:

> Prior to the death of one it is always problematical which will survive. Each, technically seised of all, has an inchoate possibility of actually receiving all. The possibility is real and valuable, though uncertain. Mere possibilities are inalienable in the common-law system of estates. But this one is peculiar in being coupled, in legal theory, with a presently vested estate. This fact, coupled with the idea that inalienability in general is for the protection of the other spouse, raises the question whether a devise made by one spouse while the estate continues is wholly void or inoperative or may have the effect of a valid devise, effective if the other spouse dies first. Concededly, neither a conveyance nor a devise by one could become effective if the other should survive. Nor could there be an attachment or levy against the former under judicial process. But

beyond this there is no necessity in protecting the other spouse to prevent the survivor's conveyance, or devise, or an attachment or levy against him, from becoming effective. To do this would make the tenancy a protection against one's own improvidence, not merely against that of the spouse. We see no valid reason, from the viewpoint of protecting one spouse or the other, for not giving effect to the will of either disposing of the property, when the other dies first and the will remains unchanged and unrepublished until the death of the testator or testatrix. To do this can impair in no way the rights of either spouse acquired by virtue of the tenancy.

It is true as appellant points out that before the Wills Act of 1837 and the after-acquired property statutes the testator could not devise realty which he did not own at the time he made his will. This was on the theory that a devise of realty took effect on the date of the execution of the will. The statement, upon which appellant relies, "that the will speaks as of the date of execution, not of the date of death," is now merely a principle of construction. The date of execution fixes the time and circumstances for reference in ascertaining the intention of the testator. So far as this is merely a rule of construction, it cannot overcome the testator's clearly expressed intention. So far as it formerly applied to exclude after-acquired property from the effect of the will, Section 45 has overruled it. We do not understand it to be a rule of law in the sense that it renders property incapable of being devised. On the contrary, the will is effective as of the date of death. In determining whether the property of a testator passes by his will there is a presumption that he did not intend to die intestate, which is greatly strengthened by words of general description in the residuary clause. If the property or interest is devisable at the time of the testator's death, and if the testator has indicated sufficiently in the legal sense his testamentary intention to dispose of it, the will is effective to pass the title to

> the devisee. Here the intention of the testatrix to devise the property is clear. She owned the entire estate in fee simple when the will became effective. The interest was one she was capable of devising, subject only to the contingency that her death before her husband's would have caused the devise to fail. In that event she would not have been the owner vested with the right of transfer at the time of her death.
>
> The judgment is *affirmed*. (footnotes omitted)

In his separate opinion concurring in the result, Mr. Justice Stephens concluded as follows:

> Since at the time Mrs. Pryor executed her will she was already as a tenant by entirety owner and seized of the real property, it cannot be said that the same was "after-acquired property" in the usual sense of property title to which has been taken after the execution of a will. But although she was when she executed the will owner and seized of the property, she was not then capable of making a definitive devise of it, her husband still being alive. There was therefore lacking in her interest in the property as a tenant by entirety complete control in the sense of unrestricted power to deal with the property. Such complete control was acquired by Mrs. Pryor only at the moment of her husband's death, and that addition to her interest was I think in a proper sense of the term property acquired after the execution of her will. That being true and it being plain upon the face of her will that Mrs. Pryor intended to devise real property, if any she had, I think the property in question passed by virtue of her will and that therefore the decision of the trial court in the appellee's favor was correct.

From the foregoing, it is apparent that no member of the Court participating in the decision entertained the slightest doubt as to the correctness of the trial court's decision.

(c) *Comments on Petitioner's Application for Certiorari.*

Counsel for petitioner have undertaken at some length to analyze the opinions below and disagree with various phases of both the majority and minority opinions. It is not felt necessary herein to attempt to reply to the various arguments set forth by counsel for petitioner as they are adequately answered by the Court of Appeals. However, it should be pointed out that three District of Columbia cases cited in two places by counsel for petitioner in support of the proposition that "a will, with respect to the real estate it purports to devise, takes effect as of the date of its execution, and not the date of death of the testator", namely, *McAleer* v. *Schneider,* 2 App. D. C. 461; *Bradford* v. *Matthews,* 9 App. D. C. 438; and *Crenshaw* v. *McCormick,* 19 App. D. C. 494, were overruled by the later case of *Taylor* v. *Leesnitzer,* 37 App. D. C. 356, decided in 1911. In the *Taylor* case, the Court of Appeals applied the doctrine laid down by the Supreme Court in *Hardenburgh* v. *Ray,* 151 U. S. 112, in which Mr. Justice Jackson in closing the opinion of the Court, at p. 129, said:

> It may, therefore, be laid down as a general proposition, that where the testator makes a general devise of his real estate, especially by residuary clause, he will be considered as meaning to dispose of such property to the full extent of his capacity; and that such a devise will carry, not only the property held by him at the execution of the will, but also real estate subsequently acquired of which he may be seized and possessed at the date of his death, provided there is testamentary power to make such disposition. 1 Jarman on Wills, 326, 5th ed., and other authorities cited.

CONCLUSION.

The instant case involves only the application of well-settled principles to a particular situation. It presents no conflict of decisions. It involves no constitutional question

or question of general importance which has not been, but should be, settled by this Court. Furthermore, the decision of the Court of Appeals follows the applicable decisions of this Court and the law generally. The petition should be denied.

Respectfully submitted,

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